STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTY ALLEN FOUTS,

Defendant-Appellant.

UNPUBLISHED
February 25, 2000

No. 213741
Hillsdale Circuit Court
LC No. 98-227819

Before: Markey, P.J., and Murphy and R. B. Burns*, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of third-degree criminal sexual conduct, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). Defendant was sentenced to a term of twenty to thirty years' imprisonment, as enhanced by his status as a third-felony offender, MCL 769.11; MSA 28.1083. The term is to be served consecutively to the sentence defendant was serving at the time of trial. We affirm.

This case arises out of defendant's sexual assault of his thirteen-year-old former stepdaughter in August 1997. Defendant's first argument on appeal is that he did not receive effective assistance of counsel at trial. We disagree. Allegations pertaining to ineffective assistance of counsel must first be heard by the trial court to establish a record of the facts pertaining to such allegations. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). In cases such as this, where a *Ginther* hearing has not been held, review by this Court is limited to mistakes apparent on the record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995).

An ineffective assistance of counsel claim is reviewed to determine whether defendant has shown that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To demonstrate ineffective assistance, defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *People v Stanaway*, 446

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Mich 643, 687; 521 NW2d 557 (1994). He must also show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 687-688.

Initially, defendant argues that he was denied effective assistance of counsel because his attorney did not object to the fact that he was dressed in jail-issued clothing during trial. We disagree. We have held that a defendant's timely request to wear civilian clothing must be granted. *People v Harris,* 201 Mich App 147, 151; 505 NW2d 889 (1993). Here, defense counsel made no request for defendant to be allowed to wear civilian clothing during trial. In addition, defendant's jail clothing was referred to for the purpose of identification on two occasions during trial. While it is difficult, if not impossible, to view the decision to appear before the jury in jail clothes as a sound trial tactic, *Stanaway, supra* at 687, defendant has failed to show that it was an error on the part of his counsel that resulted in such an appearance. Moreover, defendant has not established that there is a reasonable probability that, but for any error, the result of his trial would have been different. *Id.* at 687-688. The victim gave detailed testimony regarding the assault. Also, the investigating detective testified that defendant admitted to engaging in sexual intercourse with the victim during the summer of 1997. Given this evidence, there is no reasonable probability that if defendant had been dressed in civilian clothes, he would not have been convicted of third-degree criminal sexual conduct. On this allegation, therefore, defendant has both failed to show that his counsel's performance was deficient, and failed to show that the representation so prejudiced him as to deprive him of a fair trial. *Pickens, supra* at 338.

Defendant also contends that he received ineffective assistance because his attorney, in the following exchange, questioned the victim about defendant's habit of dating very young women:

> *Q.* Did all of this come as a complete surprise to you?
>
> *A.* No.
>
> *Q.* I mean [defendant] had --
>
> *A.* No, because he's went out with 15 or 16 years [sic] old before.
>
> *Q.* So you've heard he's been dating or something with 15, 16 year olds. So it didn't surprise you?
>
> *A.* Well, kind of, because I didn't think it was going to happen to me.

It is not clear from this exchange that defense counsel intended to question the victim about defendant's dating habits. Counsel simply asked the victim if she was surprised by defendant's actions, and it is likely that he did not anticipate this question eliciting such a response. A voluntary and unresponsive answer by a witness does not ordinarily constitute error. See *People v Kelsey,* 303 Mich 715, 717; 7 NW2d 120 (1942); *People v Stegall,* 102 Mich App 147, 151; 301 NW2d 473 (1980). Though defense counsel did not object to the statement, this decision may be viewed as sound trial strategy designed to draw no further attention to the comments regarding defendant's dating habits. This Court will not second-guess counsel in matters of trial strategy. *People v Barnett,* 163 Mich App 331, 338;

414 NW2d 378 (1987). Consequently, we also find that defendant has failed to show that defense counsel's performance was deficient with regard to his cross-examination of the victim.

Defendant next argues that he was denied effective assistance of counsel because his attorney failed to object or request a limiting instruction after a police witness testified to having interviewed defendant at the Hillsdale County jail. Defendant has failed to show that counsel's decision not to object or request a limiting instruction in this situation was objectively unreasonable. The fact that defendant believes his trial counsel's tactics were unsound is irrelevant. *People v Mitchell*, 454 Mich 145, 151 n 6, 167; 560 NW2d 600 (1998). We find that just as counsel may have reasonably decided not to call attention to the victim's statements about defendant's dating habits, defense counsel may have reasonably decided not to call attention to the fact that the witness interviewed defendant while he was in jail.

Defendant additionally contends that he received ineffective assistance because his attorney did not sufficiently investigate and act in response to defendant's statements to the investigating detective regarding his sexual encounters with the victim. Defendant does not contend that he did not make the statements, or that they were made under duress. Rather, he contends that counsel should have done more investigation with regard to these statements. However, defendant has presented no evidence as to how much, or how little, investigation was done by defense counsel. Therefore, defendant has also failed to show that defense counsel's representation was deficient in this regard.

Defendant lastly argues that he received ineffective assistance of counsel because his trial attorney did not passionately represent him. As evidence of this claim, defendant states that trial counsel (1) failed to "make one objection to questions asked by the prosecutor", (2) failed to "vigorously cross examine the officer-in-charge about prior inconsistent statements made by the alleged victim", and (3) failed to make an effective opening or closing argument. We find that these arguments are without merit. Trial counsel is not required to raise a meritless objection. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Thus, the simple fact that counsel may have made no objections during trial is not evidence of ineffective assistance of counsel. Also, decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *Mitchell, supra* at 163. Defendant's argument with regard to trial counsel's cross-examination of the officer-in-charge is accordingly without merit. Finally, we have stated that trial counsel's decision whether to make an opening statement is a matter of trial strategy and will not support a claim of ineffective assistance of counsel. *People v Calhoun*, 178 Mich App 517, 524; 444 NW2d 232 (1989). Thus, we decline to sustain defendant's claim of ineffective assistance on the basis of generalized contentions regarding counsel's deficiency in opening and closing.

Defendant has failed to overcome the presumption that he received competent assistance of counsel. His arguments relate almost entirely to the soundness of his counsel's trial strategy. That a strategy does not work does not render its use ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Accordingly, we find that defendant's claim of ineffective assistance of counsel must fail.

Defendant next argues that his minimum sentence of twenty years violates the rule of proportionality. We disagree. While the sentencing guidelines do not apply to habitual offenders, sentences imposed upon habitual offenders must be proportionate. *People v Cervantes*, 448 Mich 620, 626-627; 532 NW2d 831 (1995). A sentencing court abuses its discretion when it violates the principle of proportionality, which requires that a sentence be proportionate to the seriousness of the crime and the defendant's prior record. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990).

Defendant argues that because his record "does not show any assaultive offenses or crimes involving sexual molestation or contact with minors," his sentence is excessive and not proportional. This argument is without merit. Defendant engaged in sexual intercourse with his thirteen-year-old former stepchild, held his hand over her mouth while he did so, and threatened to kill her mother if she told. As the sentencing court understandably stated, defendant's crime was "unconscionable." Furthermore, the sentencing court reasonably described defendant's criminal record as "horrendous." Defendant's previous convictions include reckless use of a firearm, breaking and entering, and possession of a loaded firearm in a vehicle. We find that defendant's twenty-year minimum sentence is proportional to the severity of his crime and his prior record. The sentencing court did not abuse its discretion.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Robert B. Burns